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No. _____

In The

Supreme Court of the United States

October Term, 1986

ESTATE OF WALTER LARKINS, Deceased,
by his Administratrix, MABEL LARKINS,
Petitioner,

-v-

FARRELL LINES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

– AND APPENDIX –

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35 pp

QUESTIONS PRESENTED

I.

IN A WRONGFUL DEATH SUIT UNDER THE JONES ACT, 46 U.S.C. 688, WHERE PRESUMPTIONS FAVORABLE TO A SEAMAN OF DUE CARE AND AGAINST SUICIDE BOTH EXIST, IS A SEAMAN LOST AT SEA ENTITLED TO THE FULL MEASURE OF ADMIRALTY'S "SPECIAL BRAND" OF *RES IPSA LOQUITUR*?

II.

WITH PRESUMPTIONS OF DUE CARE AND AGAINST SUICIDE BOTH OPERATING IN A JONES ACT SEAMAN'S FAVOR, IS IT ERROR TO REFUSE APPLICATION OF *RES IPSA LOQUITUR* FOR WANT OF KNOWLEDGE OF THE CAUSE OF THE SEAMAN'S DISAPPEARANCE AT SEA?

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No. _____

In The

Supreme Court of the United States

October Term, 1986

ESTATE OF WALTER LARKINS, Deceased,
by his Administratrix, MABEL LARKINS,
Petitioner,

-vs-

FARRELL LINES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Estate of Walter Larkins, deceased, by his Administratrix, Mabel Larkins, petitioner, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this case on December 5, 1986.

OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit affirming the judgment and jury verdict in favor of respondent is reported at 806 F.2d 510 (4th Cir. 1986) and is printed in the Appendix hereto at App. 1[1] The

[1] References to the Appendix to this Petition are designated "App. —."

notice of judgment of the Court of Appeals appears at App. 13. The judgment of the District Court appears at App. 12, and the ruling of the District Court refusing to instruct the jury on the doctrine of *res ipsa loquitur* appears at App. 11.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit, App. 1, affirming the District Court's judgment, was entered December 5, 1986. This Petition will be filed within 90 days of that date.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTE INVOLVED

1. The Jones Act, 46 U.S.C. Sec. 688(a) (1982):

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

STATEMENT OF THE CASE

The Facts

Walter Larkins, 56, an employee of respondent Farrell Lines, Inc. since 1967, was lost at sea on the night of June 13-14, 1982, while serving as a seaman aboard respondent's vessel, the AUSTRAL PIONEER.

Larkins was known by respondent and the crew to be an epileptic. A. 31-34.[2] He had a history of prior seizures aboard the AUSTRAL PIONEER which had been observed by the crew, including a chief mate, and which were written up in the ship's medical log and reported to company headquarters. A. 644-650.

On June 11, 1982, following a 10:00 a.m. fire and boat drill which he did not attend, A. 77, Larkins was found in the chief steward's office lying unconscious on the floor behind the desk with his head slightly under the chair. A. 51-54. After he came to in the presence of the chief officer and other crewmen, Larkins was allowed to rest with no further duty that day. A. 197-198. He returned to work June 12 and 13 and was last seen about 8:00 p.m., June 13. There were no witnesses to his disappearance. A. 208, 220.

Had Chief Officer Herne, the ship's designated medical officer, A. 185, known of Larkins' prior seizures he would have kept him off duty until the ship reached port, A. 237, directed and coordinated a careful watch over his life and limb, A. 209, 237, and had him examined on arrival, all in recognition that an epileptic can be lost at sea if not carefully watched. A. 237-239.

At about 8:30 a.m. on the morning of June 14, 1982, Chief Officer Herne realized that Larkins, an officer's

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[2] References to the Joint Appendix filed in the Fourth Circuit are designated "A. __"

bedroom messman, was missing. A. 659. Inquiries were made and a search of the entire vessel proved negative. It began to appear that Larkins was overboard. Exhibit P-9, A. 663. At about 9:30 a.m. the crew was mustered. Questioning revealed that Larkins was last seen about 8:00 p.m. the previous evening, June 13, getting coffee in the recreation room, A. 664, and at about the same time he had spoken from his room to a shipmate through the bulkhead next door. A. 67. Based on inquiries and the negative search, the captain assumed Larkins was overboard. Then bound for New Zealand, the ship reversed course and backtracked on what proved to be an unsuccessful search. A. 644.

Larkins had sailed with respondent since 1967, and on the AUSTRAL PIONEER since December 1979. According to the master's post-disappearance report to the company, Exhibit P-9, A. 663, Larkins' work had been "most satisfactory" and he had been a "pleasant shipmate, always ready to turn to" and with "no noted periods of moodiness or depression." A. 663. Others described him as happy, nice, well liked, A. 31, 63-64, pleasant, A. 84, and without marital problems. A. 32, 84.

The captain's investigation revealed no evidence of foul play or of bad feelings between Larkins and anyone on board. A. 664. His company report pointed out that Larkins' medicine indicated he was an epileptic and that "[t]his condition may have some bearing on the incident of June 11, [when Larkins was found unconscious in the chief steward's office] and also the disappearance of June 13." A. 664. The captain's official report to the U.S. Coast Guard called the disappearance an "accident." Exhibit P-3, A. 641.

The Suit

Claiming negligence under the Jones Act, 46 U.S.C. Sec. 688, and unseaworthiness under the general mari-

time law, Larkins' widow-Administratrix brought this action seeking damages for his wrongful death for, inter alia, respondent's failure to render adequate care or take special precautions. A. 6. Trial was held in the United States District Court for the District of Maryland in Baltimore in October, 1983.

The trial court instructed the jury that when Larkins disappeared he was presumed to have been in the performance of his duties and in the exercise of due care and, further, that he was presumed not to have committed suicide. A. 610. However, the trial court refused to instruct the jury on the doctrine of *res ipsa loquitur* despite petitioner's several requests to so charge and her argument that the doctrine applied. A. 11-17, 240-241. No reason was given:

> "THE COURT: Let's keep going on, if you will. Just for the record, I guess, various forms of a res ipsa loquitur instruction were submitted to the Court, and I simply want to put on the record that the Court has denied each and every one of those requests." A. 428.

Petitioner excepted to the refusal to so instruct. A. 624-625. The jury returned a verdict in favor of the shipowner and the judgment for respondent was affirmed by the Court of Appeals for the Fourth Circuit, 806 F.2d 510 (4th Cir. 1986), App. 1. This Petition seeks review of that affirmance.

REASONS FOR GRANTING THE WRIT

Prologue

Res ipsa loquitur permits, but does not compel, a finding of negligence or unseaworthiness where (1) the event does not ordinarily happen in the absence of

someone's fault, (2) the instrumentality was in control of defendant, and (3) the accident was not due to any voluntary action or contribution of the plaintiff. *Olsen* v. *States Line*, 378 F.2d 217, 220 (9th Cir. 1967). Evidence tending to show specific acts of negligence does not defeat the doctrine's applicability in admiralty, nor does the possibility of fault on plaintiff's part. *Id.* at 220. "Every possible alternative cause of injury need not be totally excluded for [admiralty] *res ipsa* to apply." *Higginbotham* v. *Mobil Oil Corp.*, 545 F.2d 422 (5th Cir. 1977).

While presumed to have been in the performance of his duties and in the exercise of due care for his own safety, and while presumed to have been non-suicidal, A. 610, Walter Larkins was lost at sea. The vessel and its personnel were in the exclusive control of Larkins' Jones Act employer. Seamen do not ordinarily disappear at sea absent fault on someone's part. The presumptions of due care and against suicide operating in Larkins' favor preclude the implication of fault on his part. The respondent-shipowner enjoys no similar presumption of lack of fault.

Evidence was presented that, while the shipowner knew of Larkins' prior epileptic seizures, Larkins was not protected or even cared for in a proper manner following his episode two days before his disappearance. He was neither kept off duty nor carefully watched, yet the ship's designated medical officer stated that both actions were necessary to prevent Larkins' loss at sea. A. 237-239.

I.

THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER FEDERAL CIRCUITS.

The court below held that "[w]here varying explanations are equally probable, *res ipsa loquitur* cannot

apply." App. 3-4, and that "[b]ecause varying explanations of Larkins' disappearance are possible, a *res ipsa* instruction is inappropriate." App. 5. The court purported to rely on another Fourth Circuit decision, *Swords* v. *American Sealanes, Inc.*, 443 F.2d 1324 (4th Cir. 1971), to support its holding.

Those pronouncements by the Fourth Circuit on Jones Act *res ipsa* maritime law *directly* conflict with decisions of several other circuits, notably:

> The First, in *Barboza* v. *Texaco, Inc.*, 434 F.2d 121 (1st Cir. 1970), holding maritime *res ipsa* applicable even though competing inferences are equally probable;
>
> The Fifth, in *Landry* v. *Two R. Drilling Co.*, 511 F.2d 138 (5th Cir. 1975), another disappearance-drowning case, and *Gibbs* v. *Kiesel*, 382 F.2d 917 (5th Cir. 1967);[3]
>
> The Sixth, in *Sweeney* v. *American Steamship Company*, 491 F.2d 1085 (6th Cir. 1974), a seaman's disappearance case nearly on all fours with the instant action;
>
> The Ninth, in *Admiral Towing Co.* v. *Woolen*, 290 F.2d 641, 651 (9th Cir. 1961), invoking admiralty's "special brand" of *res ipsa loquitur* when a tug mysteriously disappeared, even though the disappearance might have been attributed to any one of several causes; in *Olson* v. *States Line*, 378

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[3] In *Gibbs* the court noted:

". . . that the doctrine of res ipsa loquitur in admiralty cases is only *similar* to the doctrine in ordinary tort law. One distinction is that res ipsa loquitur in tort law requires that the accident be one that would not ordinarily occur without negligence. The negligence concept plays no part in unseaworthiness." 382 F.2d at 919, n. 3 (emphasis added).

F.2d 217 (9th Cir. 1967), holding the admiralty version of *res ipsa loquitur* applicable even where attempts are made to prove specific acts of negligence; and in *Ashland* v. *Ling-Temco-Vought, Inc.*, 711 F.2d 1431 (9th Cir. 1983), a Death on the High Seas Act case, 46 U.S.C. 761, where the trial court's instruction to the jury that "you may infer that the death of plaintiff's decedent was caused by the negligence of the defendants" was affirmed even though the Court of Appeals acknowledged that "the precise cause of the accident remains a mystery," *Id.* at 1439.

The decision below also conflicts with the Second Circuit decision of *In re Marine Sulfur Queen*, 460 F.2d 89 (2d Cir. 1972), permitting an inference of shipowner-fault in the disappearance of a ship with loss of all hands even though the trial court stated that "no one knows how the ship was lost," *Id.* at 98.

Another Fifth Circuit decision in conflict with the Fourth Circuit decision below is *Higginbotham* v. *Mobil Oil Corp.*, 545 F.2d 422(5th Cir. 1977) *rev'd on other grounds*, 436 U.S. 618, 98 S. Ct. 2010, 56 L. Ed. 2d 581 (1978) holding *res ipsa loquitur* applicable to plaintiff's maritime employer where a Jones Act seaman was killed in a helicopter crash at sea. Although the crash could not be attributed to any one of several possible causes, application of *res ipsa* permitted a "reasonable inference of fault." Significantly, in *Higginbotham* the Fifth Circuit applied the more liberal maritime *res ipsa loquitur* rule against the Jones Act employer while simultaneously refusing to apply the doctrine against the non-employer helicopter manufacturer.

Last term this Court granted certiorari in *Offshore Logistics, Inc.* v. *Tallentire*, __ U.S. __, 91 L. Ed. 2d 174 (1986) to resolve conflicting maritime decisions among

the federal circuits. The Court should do the same in this case to provide uniformity with respect to an important principle of maritime law and to bring the Fourth Circuit in line with other circuits and with decisions of this Court as to the proper application of *res ipsa loquitur* in Jones Act wrongful death and personal injury cases.

II.

THE DECISION BELOW CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

The court below recognized that this Court has held *res ipsa loquitur* available in Jones Act cases to permit the factfinder to infer negligence from unexplained circumstances. App. 3; *Johnson* v. *United States*, 333 U.S. 46, 68 S. Ct. 391, 92 L. Ed. 464 (1948). But the court then proceeded to mix two other doctrines into its reason for denying a *res ipsa* instruction to the jury — doctrines which do not undermine, but rather support, the application of *res ipsa loquitur* here. The court mentioned the seaman's relatively light burden of proof of negligence, unseaworthiness and causation, Cf. *Ferguson* v. *Moore-McCormack Lines*, 352 U.S. 521, 77 S. Ct. 457, 1 L. Ed. 2d 511 (1956), and the importance of the jury's role in resolving Jones Act disputes. App. 3.

Valid as they are, those doctrines say nothing directly about the doctrine of *res ipsa loquitur* in Jones Act cases, and indirectly would favor the jury being instructed on its right to draw inferences of causal fault from unexplained events. This Court's leading Jones Act *res ipsa* decision holds:

> No act need be explicable only in terms of negligence on order for the rule of *res ipsa loquitur* to

> be involved. The rule deals only with permissible inferences from unexplained events.
>
> *Johnson* v. *United States*, 333 U.S. at 49.

The court below went far afield when it held that submission of the doctrine is only required "[w]here the 'balance of probabilities' might reasonably be found in favor of negligence," App. 3, and "[b]ecause varying explanations of Larkins' disappearance are possible, a *res ipsa* instruction is inappropriate." App. 5. Those statements are wrong for three reasons.[4]

First, the court's "balance of probabilities" gloss on the *res ipsa* rule is unsupported in maritime law (except now in only the Fourth Circuit) and conflicts with the above quote from *Johnson*. Indeed, the "balance of probabilities" test has been expressly rejected by this Court. "It does not matter that, from the evidence, the jury may also with reason on grounds of probability, attribute the result to other causes," including plaintiff's own negligence. *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500, 506, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957). The "balance" test also conflicts with decisions of other Circuits noted in Part I above.

Illustrative is *Barboza* v. *Texaco, Inc.*, 434 F.2d 121 (1st Cir. 1970), a Jones Act *res ipsa* decision. There, the court noted that the liberality allowed juries in F.E.L.A. and Jones Act cases goes "beyond the more-likely-than-not standard" sometimes employed in land-based *res ipsa* cases. The *Barboza* court interpreted this Court's *Rogers* decision to mean that the maritime rule of *res ipsa*

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[4] Those statements by the court below are erroneous even for shoreside *res ipsa*. Varying explanations could well explain why the flour barrel rolled out of the warehouse window in the seminal *res ipsa* case. *Byrne* v. *Boadle*, 2 H. & C. 722, 159 Eng. Rep. 299 (1863). That varying explanations may exist, however, is cause not to defeat the doctrine but to invoke it.

allowing, but not compelling, a jury inference "as to both the cause of an accident and as to the presence of negligence" is proper, *even when* competing inferences are equally probable. *Id.* at 123. The court also read *Rogers* as rejecting "the formal prerequisite of common law *res ipsa* that all of the probable causative factors involved be in the control of the defendant." *Id.* at 124.

Second, if the "balance of probabilities" must weigh in favor of negligence before *res ipsa* applies, then the rule is unnecessary and meaningless. The Fourth Circuit's "balance" prerequisite, in effect, means that a rule designed to eliminate the need to prove negligence or other fault in appropriate cases can only be invoked when negligence or fault can be proven in the first place.

Third, varying explanations are not *equally* possible in this case. Although the court below observed that fault on the part of Larkins or even suicide might have been the cause of his disappearance, the court failed to note, as the trial court had instructed, App. 610, that Larkins was presumed to have been in the performance of his duties and in the exercise of due care for his own safety and was also presumed not to have committed suicide. These two presumptions worked in Larkins' favor to protect him from implication in his own death. "Where the injured person is not implicated," *res ipsa's* vitality must prevail. *Johnson* at 48.

In its preoccupation with possible jury "speculation," App. 4, the decision below was also in conflict with *Lavender* v. *Kurn*, 327 U.S. 645, 66 S. Ct. 740, 90 L. Ed. 916 (1944). *Lavender* was a Federal Employers' Liability Act case, 45 U.S.C. 51. The F.E.L.A. standard of liability is applicable to Jones Act suits. *Johnson* at 49; 46 U.S.C. 688. In *Lavender*, this Court held:

> It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference.
>
> *Id.* at 653.

The Sixth Circuit relied on this language in *Sweeney* v. *American Steamship Company*, 491 F.2d 1085 (6th Cir. 1974) to uphold a finding of negligence in a seaman's unwitnessed and fatal disappearance over the side of his employer's ship, against the charge on appeal that the factfinder had engaged in speculation and conjecture. In *Sweeney*, as in the case at bar, possibilities other than negligence on the part of the Jones Act employer could have accounted for the seaman's disappearance, including fault on his part or even suicide. Since negligence of the defendant was also a possible inference, the judgment in *Sweeney* was upheld. *Id.* at 1089.

III.

THE DECISION BELOW VIOLATES THIS COURT'S "SETTLED CANON OF MARITIME JURISPRUDENCE".

In refusing to allow the jury to be instructed on the doctrine of *res ipsa loquitur*, both courts below failed to follow this Courts "settled canon of maritime jurisprudence," to give rather than to withold remedies to seamen even in doubtful cases. *American Export Lines, Inc.* v. *Alvez*, 446 U.S. 274, 281, 100 S. Ct. 1673, 64 L. Ed. 2d 284 (1980).

Consistent with the unique employment environment of seamen, maritime law has responded by imposing

duties and obligations upon shipowners unlike and beyond those imposed on land-based employers. *Jamison* v. *Encarnacion*, 281 U.S. 635, 50 S. Ct. 440, 84 L. Ed. 1082, (1930). The liberal and humanitarian policy of seamen's law is a natural outgrowth of the seaman's confinement, his working conditions and his solitary, hazardous calling. *Socony-Vacuum Oil Co., Inc.* v. *Smith*, 305 U.S. 424, 430, 59 S. Ct. 262, 83 L. Ed. 265 (1939).

Long regarded as "wards of the admiralty," *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 63 S. Ct. 246, 84 L. Ed. 239 (1942), seamen are entitled to singularly liberal remedies for their protection, remedies unavailable to their shoreside brethren. The Jones Act, 46 U.S.C. Sec. 688, the warranty of seaworthiness, the right to maintenance and cure, and penalty wages, 46 U.S.C. 10313, 10504, are but a few examples.

This Court recently reminded us of its solicitude for seamen in *American Export Lines, Inc.* v. *Alvez*, 446 U.S. 274, 100 S. Ct. 1673, 64 L. Ed. 2d 284 (1980):

> Admiralty jurisprudence has always been inspirited with a 'special solicitude for the welfare of those men who under[take] to venture upon hazardous and unpredictable sea voyages.' *Moragne* v. *States Marine Lines, supra*, at 387, 90 S. Ct. at 1780. As in *Moragne* and *Gaudet*, '[o]ur approach to the resolution of the issue before us . . . [is] consistent with the extension of this 'special solicitude' to the dependents of [seafarers] . . .' *Gaudet, supra*, 414, U.S. at 577, 94 S. Ct. at 811.

Should doubts arise with regard to the availibility of remedies for the seafarer's protection, this Court has pronounced the "settled canon of maritime jurisprudence" for the resolution of those doubts. *Id.* at 281. The words of *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573,

583, 94 S. Ct. 806, 39 L. Ed. 2d 7 (1974), and *American Export Lines* v. *Alvez*, at 281-282 (1980) reflect that canon:

> [I]t better becomes the humane and liberal character of proceedings in admiralty to give than to withold the remedy, when not required to withold it by established and inflexible rules.

Res ipsa loquitur can supply negligence and the unproven causal link. No "inflexible rules" precluded application of the doctrine here; on the contrary, as the above decisions make clear, a seaman's disappearance at sea is a classic case for *res ipsa*. Application of the doctrine is such an important part of both F.E.L.A. and maritime jurisprudence that the decision below should be reviewed and then brought in line with the decisions of other Circuits and of this Court. Uniformity has always been a paramount goal of maritime law. *Southern Pac. Co.* v. *Jensen*, 244 U.S. 205, 37 S. Ct. 524, 61 L. Ed. 1086 (1917). The Larkins jury should have been instructed on the existence and application of the doctrine of *res ipsa* and allowed to draw the permissible inferences. That is the "very essence of [a jury's] function . . . to select from among conflicting inferences and conclusions that which it considers most reasonable." *Schulz* v. *Pennsylvania Railroad Company*, 350 U.S. 523, 526, 76 S. Ct. 608, 100 L. Ed. 688 (1956). *Res ipsa* jury instructions are the means to that end.

In addition to its conflict with decisions of other circuits and with decisions of this Court, the decision below conflicts with this Court's and the maritime law's "special solicitude" and humanitarian policies favoring seamen — policies favoring giving rather than withholding the *res ipsa* doctrine here.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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Dated: March 5, 1987

APPENDIX TO PETITION FOR CERTIORARI

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OPINION

— ***PUBLISHED*** —

(United States Court of Appeals for the Fourth Circuit)

(Argued October 8, 1986; Decided December 5, 1986)

(Estate of Walter Larkin, deceased, by his Administratrix, Mabel Larkins, Appellant, versus Farrell Lines, Incorporated, Appellee — No. 83-2162; Appeal from the United States District Court for the District of Maryland, at Baltimore; Joseph C. Howard, District Judge; C/A 82-2645)

Before PHILLIPS and WILKINSON, Circuit Judges,
and BUTZNER, Senior Circuit Judge.

Robert A. Jenkins
(Leonard C. Jaques; Jaques Admiralty Law Firm, P.C. on brief) for appellant;
Randall C. Coleman
(Ober, Kaler, Grimes & Shriver on brief) for appellee.

WILKINSON, Circuit Judge:

Walter Larkins, a merchant sailor employed by Farrell Lines, was lost at sea. His estate brought suit against Farrell Lines alleging that Farrell was negligent under the Jones Act, and that Farrell's vessel, the *Austral Pioneer*, was unseaworthy under general maritime law. At trial, the jury returned a verdict for defendant. Larkins' estate now makes various assignments of error pertaining primarily to the district court's jury instructions. We do not find these persuasive, and we therefore affirm.

I.

Walter Larkins' duties on the *Austral Pioneer* consisted of cleaning and maintaining the officers' quarters. Sometime during the night of June 13, 1982, Larkins disappeared from the vessel which was then en route to New Zealand. He was last seen at about 8 p.m. in his room and was reported missing the next morning at 8:30 a.m. when he failed to appear for his duties. During the night the seas were rough, and the ship's captain ordered the crew to clear the deck as a safety measure. After a search of the ship and the surrounding waters, Larkins was presumed lost at sea.

Larkins, fifty-five at the time of his death, took medication to control his epilepsy and high blood pressure. On June 11, two days before his disappearance, he was found unconscious in the chief steward's office. When he revived, Larkins said that he sometimes fainted when he failed to take his blood pressure medicine.

Larkins' widow brought suit under the Jones Act and under general maritime law. She argued at trial that the ship's officers were aware of Larkins' epileptic condition, but negligently failed to provide "special precautions" to protect him. She also asserted that the officers' failure to safeguard her husband rendered the vessel unseaworthy. The jury held for the defendant, returning special verdicts that Farrell was not negligent and that the *Austral Pioneer* was not unseaworthy. We now consider appellant's various assignments of error in turn.

II.

Appellant's chief complaint is that the trial judge failed to instruct the jury that, under the doctrine of *res ipsa loquitur*, it could infer appellee's negligence and the vessel's unseaworthiness from the fact of Larkins' dis-

appearance. We do not believe, however, that the disappearance presents circumstances that warrant a charge of inferred negligence or unseaworthiness. We hold, therefore, that the district court's refusal to give the requested instruction was proper.

The Supreme Court has developed a law of *res ipsa loquitur* in admiralty that permits the trier of fact to draw inferences of negligence from unexplained circumstances. *Johnson* v. *United States*, 333 U.S. 46 (1948). Under the Jones Act, the standard of recovery has not been a strict one, and seamen have been afforded the "judicially developed doctrine of liability granted to railroad workers by the FELA," *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 439 (1958), including its light burden of proof on negligence and causation. While the standard of causation for unseaworthiness is "more demanding," *Chisholm* v. *Sabine Towing & Transportation Co.*, 679 F.2d 60, 62 (5th Cir. 1982), the plaintiff's burden in either case has been characterized as light. *Vallot* v. *Central Gulf Lines*, 641 F.2d 347, 350 (5th Cir. 1981). The jury's role, moreover, has been an important one in such cases, and doubts have been resolved in favor of submission. G. Gilmore and C. Black, *The Law of Admiralty* 377 (2d ed. 1975).

In admiralty, *res ipsa loquitur* may be most relevant in determining which cases of unexplained circumstances should go to the jury. Where "the balance of probabilities" might reasonably be found in favor of negligence, submission is required. The mere happening of an accident, however, does not give rise to a *res ipsa* inference of negligence or breach of duty under the Jones Act or general maritime law. *Kiesel* v. *American Trading Production Corp.*, 347 F.Supp. 673, 678-79 (D. Md. 1972); *Ursich* v. *da Rosa*, 328 F.2d 794 (9th Cir. 1964). Where varying explanations are equally probable, *res ipsa*

loquitur cannot apply. W. Prosser and W. Keeton, *Law of Torts*, 248-49, 257-58 (5th ed. 1984).

While the historic purposes of admiralty law may favor jury resolution of personal injury claims, instructions on *res ipsa loquitur* should be carefully circumscribed where, as here, a seaman's disappearance is mysterious. Charging the jury to infer negligence or unseaworthiness from the fact of the seaman's disappearance, without more, invites a verdict based on sympathy or speculation. *See Swords* v. *American Sealanes, Inc.*, 443 F.2d 1324, 1325 (4th Cir. 1971). A jury instruction of *res ipsa* under these circumstances may make the plaintiff's light burden nonexistent, and deprive the jury of its traditional role of assigning fault in negligence actions and assigning weight to circumstantial evidence. Such an instruction, in fact, all but directs a finding of liability where questions both of fault and causation may be much in dispute.

For a *res ipsa* instruction to be warranted, the plaintiff must establish that "(1) the event is of a type which ordinarily does not happen in the absence of someone's negligence; (2) the instrumentality causing the injury was, at the time of the accident, within the exclusive control of the defendant; (3) the accident was not due to any voluntary action or contribution on the part of the plaintiff." *Olsen* v. *States Line*, 378 F.2d 217, 220 (9th Cir. 1967); *Savard* v. *Marine Contracting*, 471 F.2d 536, 542 (2d Cir. 1972).

Here, however, far too little is known of the facts surrounding Larkins' disappearance to "let the thing speak for itself." Because the specific instrumentality that caused Larkins' disappearance is unknown, it is impossible to determine whether that instrumentality was in appellee's exclusive control. While appellee was in control of the *Austral Pioneer* itself, there is no evidence that

the condition of the vessel's gear or appurtenances contributed to the disappearance. Larkins may have been swept overboard by the rough weather when, in spite of the captain's order to the contrary, he went up on deck. He may have committed suicide. An epileptic seizure may have played some part in this sad event, but exactly what part is unclear. The only evidence of negligence presented by the plaintiff — that of the crew's alleged failure to take special precautions for an epileptic seaman — was a matter for the jury under the usual preponderance standard, not under a *res ipsa* instruction. Because varying explanations of Larkins' disappearance are possible, a *res ipsa* instruction is inappropriate.

In *Swords* v. *American Sealanes, Inc.*, 443 F.2d 1324 (4th Cir. 1971), this court reversed for lack of evidence a jury verdict on unseaworthiness in a seaman's unwitnessed disappearance from his duty post. Judge Butzner dissented, arguing that a sagging chain guardrail warranted an inference of unseaworthiness sufficient to take the issue to the jury. *Id.* at 1326.

In the instant case, the trial judge allowed the issue of negligence and unseaworthiness to go to the jury on substantially less than a sagging guardrail. The court instructed the jury "on the 'slight negligence' test to be applied in determining liability under the Jones Act" and on "the absolute duty of the shipowner in respect to unseaworthiness." *Rabb* v. *Canal Barge Company*, 428 F.2d 201, 204 (5th Cir. 1970). Its treatment of appellant was fair and even generous. Appellant's further request for a *res ipsa* instruction simply asks too much.

III.

Appellant next contends that the trial court erred in instructing the jury that Larkins had a duty to disclose his epileptic condition during pre-voyage physical exam-

inations and that he could not recover for negligence if he misrepresented his condition. Relying on *Still* v. *Norfolk & Western Railway*, 368 U.S. 35 (1961), appellant argues that concealment or misrepresentation may not serve to defeat a seaman's recovery for negligence under the Jones Act even when the misrepresentation bears a causal relationship to the injury involved. The instruction as given, however, is consistent with *Still*.

The trial judge instructed the jury that:

> If you find that decedent knowingly misrepresented his physical condition, and, that because of that misrepresentation defendant was justified in not making special precautions for Larkins' safety, then you may not find the defendant negligent in that regard.

Appellant interprets this instruction to mean that, if Larkins misrepresented his epileptic condition, the jury was precluded from finding appellee negligent in *any* regard. The trial court's instruction, however, addressed only the failure to take special precautions. Under the Jones Act, a shipowner's duty is to provide seamen with a safe place to work. *Michalic* v. *Cleveland Tankers*, 364 U.S. 325, 327-8 (1960). A shipowner is not obligated to provide any special precautions, however, unless he knows of a particular physical condition requiring such precautions. *Compare Carlton* v. *M/G Transport Services*, 698 F.2d 846 (6th Cir. 1983) (directed verdict for defendant upheld where defendant shipowner had no knowledge of seaman's heart disease) with *Mroz* v. *Dravo Corp.*, 293 F. Supp. 499 (W.D. Pa. 1968), *aff'd* 429 F.2d 1156 (3d Cir. 1970) (evidence sufficient to support finding of negligence where shipowner's medical examiner knew of cook's emphysema, but permitted her to work in conditions where she was forced to breathe diesel fumes). The trial court's instruction with respect

to the shipowner's duty was necessary to convey to the jury a clear and correct understanding of the applicable law.

The instruction was also necessary because appellant put in dispute the qualifications of the physicians who conducted the pre-voyage examination and alleged that they were negligent in certifying decedent to be medically fit. Appellee thereupon put on testimony from the examining physicians as to the misrepresentation. Appellant cannot now complain that it was inappropriate for the trial judge to instruct the jury as to the misrepresentation.

IV.

Appellant further contends that the trial judge erred by requiring, as part of the unseaworthiness instruction, that the jury first determine whether Larkins' bout of unconsciousness two days before his disappearance put appellee on notice of Larkins' need for special precautions. The charge read as follows:

> [L]iability for failing to recognize potentially serious medical problems, cannot be imposed where, considering all of the circumstances, Larkins' loss of consciousness yould not have put a reasonable and prudent layman, trained in first aid, on notice of the existence of such problems. Therefore, unless you find that Larkins' loss of consciousness was so indicative of a serious medical problem, as to put defendant's personnel on notice that Larkins required protective precautions to ensure his safety, you must find the ship seaworthy.

To begin with, appellant failed to object to this instruction with the distinctness and specificity that Fed.

R. Civ. P. 51 requires. The objection, if it can be termed that, was garbled, and failed to apprise the trial judge of its basis. Appellant apparently concedes that the trial record does not contain an adequate objection to the unseaworthiness charge, but contends that she made a fuller objection during a five and one half charge conference with the trial judge. That bare reference to an off-the-record statement affords no basis for appellate review. *King* v. *Ford Motor Co.*, 597 F.2d 436, 440 n. 3 (5th Cir. 1979). The trial judge, moreover, understood that plaintiff agreed to the instruction in conference. The trial transcript makes clear that either no objection was made or that the trial judge did not understand it. In either case, appellant failed to comply with Rule 51.

We also decline appellant's invitation to hold the given instruction was plain error. Instances of plain error must be rare and reserved for denials of fundamental justice. *Furka* v. *Great Lakes Dredge & Dock Co.*, 755 F.2d 1085, 1089-90 (4th Cir. 1985). The instruction here worked no such harm. It is true, as appellant contends, that seaworthiness is "an absolute duty requiring no knowledge on the part of the shipowner." *Id.* at 1087, n. 3. Thus, in the ordinary case, where the alleged unseaworthy condition concerns faulty gear or appurtenances, the shipowner cannot raise lack of notice as a defense.

It is questionable, however, whether the instant claim even pertains to unseaworthiness. In this case, the alleged "unseaworthiness" was not a failure of the vessel or its crew to be "reasonably fit for their intended use," *Mitchell* v. *Trawler Racer*, 362 U.S. 539, 550 (1960), but the failure of the crew to provide special precautions to protect Larkins from injury due to his epileptic condition. The trial court's instruction with respect to notice was pertinent as to whether the physicians and crew

even knew that special precautions were necessary. The notice instruction addressed only special precautions, not the general duty of unseaworthiness. Indeed, the jury received a proper general instruction that no notice was required to bring that duty into being.

V.

Appellant's remaining assignments of error are easily addressed. She contends that the trial judge erroneously allowed into evidence the fact of Larkins' prior alcoholism and then compounded this prejudicial error in instructions to the jury.

We disagree. The trial judge enjoys broad discretion in balancing the relevance of evidence against its possible unfair prejudice under Fed. R. Evid. 403. The Rule 403 balance is essentially a matter of trial conduct; "if judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." *United States* v. *Long*, 574 F.2d 761, 767 (3d Cir. 1978). Here the evidence was relevant to the cause, severity, and treatment of Larkins' seizures, to plaintiff's complaints of medical malpractice, and to defendant's failure to take special precautions in his behalf.

The trial judge instructed the jury that Larkins' alcoholism did not play a part in his disappearance. That instruction was curative, not prejudicial. The mild instruction sought, in fact, to place the evidence in some perspective for the jury after the emphasis of the matter in plaintiff's own closing argument.

VI.

Finally, appellant argues that the trial judge committed reversible error by refusing to strike the expert testimony of Dr. Ernest Niedermeyer. At trial, Dr. Niedermeyer stated at one point that it was "common

sense" to conclude through a process of elimination that Larkins committed suicide. According to appellant, the expert's statement was highly prejudicial because of the great weight that juries attach to such testimony and because the statement supplied a ready explanation for Larkins' disappearance. She argues also that the testimony usurped the jurors' duty to use their own common sense to reach a conclusion.

We decline to find an abuse of discretion in the refusal of the trial judge to strike this testimony. Dr. Niedermeyer used his expertise as an epileptologist to rule out the possibility that Larkins fell overboard during either "a grand mal seizure" or a "temporal lobe attack." He then testified to the existence of a correlation between epilepsy and suicide. The trial judge could well have concluded that the testimony was "specialized knowledge" that would assist the jury within the parameters of Fed. R. Evid. 702 *et seq.* We likewise decline to adopt a rule that the use of the words "common sense" in the course of expert testimony automatically renders that testimony inadmissible. A review of the record indicated that Dr. Niedermeyer's judgment drew upon his medical specialty. What seems "common sense" to an expert may represent the intuitive application of accumulated expertise.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

EXCERPT OF TRIAL TRANSCRIPT, VOLUME V

(United States District Court — District of Maryland)

(Proceedings of October 24, 1983)

(WALTER LARKINS, et al, v. FARRELL LINES — CIVIL ACTION JH-82-2645)

Baltimore, Maryland
October 24, 1983

The above-entitled case continued on trial before The Honorable Joseph C. Howard and a jury at 10:00 a.m.

APPEARANCES

ON BEHALF OF THE PLAINTIFF

Leonard C. Jaques, Esquire; Gary William Baun, Esquire; Donald McLennin, Esquire.

ON BEHALF OF THE DEFENDANT

Randall C. Coleman, Esquire; Patricia A. Mathias, Esquire.

VOLUME V

* * *

(P. 14) * * * [LINE 21] THE COURT: Let's keep on going, if you will. Just for the record, I guess, various forms of a res ipsa loquitur instruction were submitted to the Court, and I simply want to put on the record that the Court has denied each and every one of those requests.

* * *

JUDGMENT

(United States District Court — District of Maryland)

(Dated October 27, 1983)

(ESTATE OF WALTER LARKINS, deceased, by his Administratrix MABEL LARKINS vs FARRELL LINES INCORPORATED — CIVIL ACTION NO. JH-82-2645)

This action came on for trial before the Court and a Jury, Honorable Joseph C. Howard, United States District Judge, presiding. The issues having been duly tried and the jury having duly rendered its verdict, it is Ordered and Adjudged that Judgment be entered in favor of Defendant against Plaintiff.

Dated at Baltimore, Maryland this 27th day of October, 1983.

PAUL R. SCHLITZ, Clerk
By: /s/ Venecia A. Butler, Deputy Clerk

[*EXCERPT OF*] **NOTICE OF JUDGMENT**

(United States Court of Appeals for the Fourth Circuit)

(Dated December 5, 1986)

TO: Leonard C. Jaques, Esq.
Robert A. Jenkins, Esq.
Patricia A. Mathias, Esq.
Randall C. Coleman, Esq.

NOTICE OF JUDGMENT

Judgment was entered in Case No. 83-2162 this date. The Court's opinion is enclosed.

* * *

JOHN M. GREACEN
CLERK

Supreme Court, U.S.
FILED
APR 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1433

In the Supreme Court of the United States

OCTOBER TERM, 1986

ESTATE OF WALTER LARKINS, DECEASED,
BY HIS ADMINISTRATRIX, MABEL LARKINS,
Petitioner,

v.

FARRELL LINES, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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22P

QUESTIONS PRESENTED

I. Did the trial court properly decline to give petitioner's proposed jury instructions on *res ipsa loquitur* when none of the essential three elements of *res ipsa loquitur* was present in the case and petitioner failed to object to the jury charge as required by Rule 51 of the Federal Rules of Civil Procedure?

II. Did the trial court correctly entrust to the jury the questions of whether, based upon all direct and circumstantial evidence presented at trial, respondent was negligent or respondent's vessel was unseaworthy and whether respondent was a cause in whole or in part, directly or indirectly, however small, in the loss of Mr. Larkins' life?

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No. 86-1433

In the Supreme Court of the United States

OCTOBER TERM, 1986

ESTATE OF WALTER LARKINS, DECEASED,
BY HIS ADMINISTRATRIX, MABEL LARKINS,
Petitioner,

v.

FARRELL LINES, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

The Facts

Generally, respondent vessel owner agrees with petitioner's factual statement of the case, but there are certain significant, relevant omissions which should be called to the Court's attention.

Walter Larkins disappeared at sea on the night of June 13-14, 1982 (A640).[1] Larkins, 55 years old at the time of his death, was employed as a utility man aboard the AUSTRAL PIONEER. His duties aboard ship consisted of cleaning and maintaining the officers' quarters (A338, 339, 691).

* Respondent has no corporate parents, subsidiaries or affiliates.

[1] References to the Joint Appendix filed in the Fourth Circuit are designated "A" followed by the appropriate page number.

When Larkins was 52 years old, he began to have epileptic seizures (A690-693). He also suffered from high blood pressure. Larkins reported regularly to various medical facilities for examination and medication for epilepsy as well as high blood pressure. His doctors knew he was a merchant seaman and that he would be at sea for long periods; thus, his prescriptions were for several months' duration and he was able to function normally for such periods (A125-126, 141, 144). It was appropriate for an epileptic to perform the type of work performed by Larkins (A273-274).

On two occasions prior to the voyage on which he disappeared, Larkins had seizures aboard the AUSTRAL PIONEER. The first occasion was on voyage 4 when the vessel was in Auckland, New Zealand (A206). The medical log for August 17, 1980 notes that Larkins collapsed on board at 11:48 a.m. and was returned to the vessel at 3:15 p.m. "fit for duty – told to rest for one day after his epileptic attack" (A644). The second incident was during voyage 10 on December 27, 1981. The 9:45 p.m. entry noted that Larkins was having a seizure, that at 9:48 p.m. "Mr. Larkins came out of the seizure appeared o.k. These occur about every three-four months" (A646). The officers aboard the ship on Larkins' final voyage had not been aboard during voyages 4 or 10 (A398).

Farrell Lines required its seamen to undergo a pre-sign-on physical examination which was turned over to the ship's officers prior to the voyage (A244, 330). Larkins had undergone five such pre-sign-on examinations in which he admitted to taking medication for hypertension, but specifically denied any history of epilepsy (A248-256, 676-685). His most recent physical was on May 19, 1982, immediately prior to signing articles for voyage 13, his final voyage, on May 24, 1982 (A658, 685).

On June 11, 1982, Larkins was found unconscious in the Chief Steward's office. Chief Mate Herne came to the office when notified and, after a short time, Larkins regained consciousness, appeared embarrassed, but was otherwise perfectly normal (A189-190, 389). He said he had forgotten to take his blood pressure pills which sometimes caused him to faint. Chief Mate Herne believed him. His own wife fainted when she failed to take her blood pressure pills (A199). Dr. Niedermeyer con-

sidered failure to take blood pressure pills a plausible explanation for Larkins' fainting (A284). Larkins was sent to his room to rest for the remainder of the day and performed no duties. Thereafter, he appeared to be perfectly normal. The next morning, he resumed his regular duties and continued to perform those duties through June 13, 1982 (A189-190, 208, 344-345).

When Larkins was discovered missing on the morning of June 14, 1982, the general alarm was sounded, the crew was mustered and the AUSTRAL PIONEER reversed course. Extra lookouts were posted and "man overboard" messages were sent to all ships (A657; SA47-48)[2]. The search of the vessel continued throughout the backtracking. The vessel continued on her reverse course for thirteen hours, until 11 p.m. on June 14, at which time the vessel reached her June 13, 8 p.m. position, the last time anyone had spoken with Larkins (A657). The sea search was negative and it was presumed Larkins was lost at sea.

The room where Larkins slept was located in the approximate center of the crew berthing spaces on the upper deck of the AUSTRAL PIONEER (A665-666). The ship's rail on the upper deck was 41 and one-half inches high. (A356-357). The ship's rail at the main deck was 43 inches high. (A357, 666). Larkins was five feet seven inches tall (A84).

The only medical expert who testified as to the possible causes of Larkins' disappearance at sea was Dr. Ernst Niedermeyer, Director of the Adult Seizure Clinic and an Associate Professor of Neurology and Neurological Surgery at Johns Hopkins University. Dr. Niedermeyer used his expertise as an epileptologist to rule out the possibility that Larkins fell overboard during either a grand mal seizure or a temporal lobe attack. Dr. Niedermeyer's opinion was that Larkins had committed suicide (A285-286). He testified about the known high correlation between epilepsy and suicide (A291).

The Suit

Petitioner, Mrs. Larkins, sued respondent, Farrell Lines, claiming that her husband's death was due to respondent's

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[2] References to the Supplemental Appendix are designated "SA" followed by the appropriate page number. The Supplemental Appendix is attached to the end of respondent's brief to the Fourth Circuit.

neligence under the Jones Act, 46 U.S.C. § 688, and the unseaworthiness of the AUSTRAL PIONEER under the general maritime law (A6). A jury trial was held in the United States District Court for the District of Maryland in October 1983.

The trial court instructed the jury that "under the [Jones] Act, if an employer's negligence played any part, even the slightest in producing the loss, the employer is considered negligent." (A610). The "even the slightest" language was repeated in the charge (at A611) and once again on the special verdict form itself which asks the jury, "Did defendant's negligence cause or contribute even in the slightest to Walter Larkins' death?" (SA106-107).

Similarly, the special verdict form required the jury to decide whether the AUSTRAL PIONEER was unseaworthy at the time Larkins died and, if so, "Did the AUSTRAL PIONEER's unseaworthiness cause or substantially contribute to Walter Larkins' death?" (SA 106-107).

The jury was also instructed that "the law makes no distinction between direct and circumstantial evidence" (A607). Circumstantial evidence was defined for the jury as "proof of a chain of circumstances pointing to the existence or nonexistence of certain facts" (A607). The jury was instructed that if it found negligence by the ship owner, it must then decide whether the defendant's negligence "caused or contributed to the loss" (A614). The jury was told that its verdict must be for the plaintiff on the question of negligence if defendant "was a cause in whole or in part, directly or indirectly, however small, in the loss of Mr. Larkins' life" (A614).

Counsel for petitioner submitted various jury instructions on *res ipsa loquitur*. The proposed instructions were among those discussed in a chambers conference over a period of five and one-half hours on Saturday, October 22, 1983 and continued on Monday, October 24, 1983 (A627-628). On the record, the trial judge inquired of counsel for petitioner as to how the doctrine applied here. Counsel replied:

> So, what we have here is a situation where the rule of permissible inference from unexplained events is characterized as the court's special brand of res ipsa loquitur, and I have the case cited.

Now, here is something else . . .
(A240-241).

Res ipsa loquitur was not mentioned again until the court ruled that the instruction was inappropriate (A428). Petitioner's Brief quotes only a portion of Judge Howard's ruling. *See* Petitioner's Brief at 5, App. 11. The judge invited petitioner's counsel to state his position: "Do you want to be heard on the res ipsa situation?" The reply by counsel was, "No, sir, not on the res ipsa." (A429).

Contrary to the assertion in Petitioner's Statement of the Case (Petitioner's Brief at 5), Petitioner failed to take exception to the court's decision not to instruct on *res ipsa loquitur* as required by Rule 51 of the Federal Rules of Civil Procedure (A624-625).

The jury found that respondent was not negligent and that the AUSTRAL PIONEER was seaworthy. Therefore, they never reached the questions of whether respondent's negligence caused or contributed even in the slightest to Walter Larkins' death or whether the AUSTRAL PIONEER's unseaworthiness caused or substantially contributed to Larkins' death (SA106-107). Judgment was entered for respondent and affirmed by the Court of Appeals for the Fourth Circuit, 806 F.2d 510 (4th Cir. 1986). Petitioner seeks review of that affirmance. Respondent opposes petitioner's request.

REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari should be denied because petitioner failed to preserve the issue for appeal, the decision below is correct and the failure to give the requested *res ipsa loquitur* instruction is moot because the jury never reached the issue of causation.

I. PETITIONER FAILED TO PRESERVE THE ISSUE FOR APPEAL

Counsel for petitioner excepted to many jury instructions. However, with regard to *res ipsa loquitur*, he said only, "[A]nd lastly, relative to all our instructions that would pertain to the theory of *res ipsa loquitur* relative to the instructions that were—excuse me, your honor," (A625). A discussion took place

off of the record after which counsel switched to an entirely new subject, never returning to *res ipsa*.

Rule 51 of the Federal Rules of Civil Procedure clearly states:

> No party may assign as error the giving or the failure to give an instruction unless he *objects thereto* before the jury retires to consider its verdict, *stating distinctly the matter to which he objects and the grounds of his objection.* (Emphasis supplied.)

Petitioner's objection, which does little more than mention the words *res ipsa loquitur*, "is not even remotely in accord with Rule 51." *St. Paul Fire & Marine Insurance Co. v. Piedmont Natural Gas Co.*, 397 F.2d 263, 264 (4th Cir. 1968). The purpose of Rule 51 is to inform the trial judge of possible errors so that he may have an opportunity to correct them. *Haywood v. Ball*, 586 F.2d 996, 1000 (4th Cir. 1978), *modified on other grounds*, 634 F.2d 740 (1980); *T.C. Allen Construction Co. v. Stratford Corp.*, 384 F.2d 653, 657 (4th Cir. 1967). This case demonstrates why trial counsel must state "distinctly the matter to which he objects and the grounds of his objection." Judge Howard sought guidance, but was given none (A241, 429). Rule 51 is designed to prevent litigants from covertly relying upon error to ensure a new trial in the event of an adverse verdict. *Missouri Pacific Railroad Co. v. Star City Gravel Co.*, 592 F.2d 455, 459 (8th Cir. 1979).

When Judge Howard had earlier inquired of counsel for petitioner as to how the doctrine of *res ipsa* applied to this case, counsel gave an unresponsive one-sentence answer and quickly moved to another subject (A240-241). *Res ipsa* was not mentioned again until Judge Howard ruled that the proposed instructions were inappropriate (A428). He invited petitioner's counsel to state his position: "Do you want to be heard on the res ipsa situation?" Counsel replied, "No sir, not on the res ipsa." (A429).

The mere submission of proposed instructions, without more, is not tantamount to an exception to the court's failure to give the requested instructions. *Kropp v. Ziebarth*, 601 F.2d 1348, 1357 (8th Cir. 1979). Plaintiff cannot now manufacture an issue for reversible error by enlarging and amplifying an objection

that was never made to the trial court. Plaintiff failed to object to the Court's decision not to instruct the jury on *res ipsa loquitur* and has thereby waived any such omission in the charge. *T.C. Allen Construction Co. v. Stratford Corp.*, 384 F.2d 653, 657 (4th Cir. 1967).

II. NONE OF THE THREE ELEMENTS ESSENTIAL TO AN INSTRUCTION ON *RES IPSA LOQUITUR* WAS PRESENT IN THIS CASE

Petitioner correctly states that *res ipsa loquitur* permits, but did not compel, a finding of negligence or unseaworthiness when:

(1) the event does not ordinarily happen in the absence of someone's negligence;
(2) the instrumentality causing the injury was in the *exclusive* control of the defendent (petitioner omits the exclusivity requirement from her formulation of the rule); and
(3) the accident was not due to any voluntary action or contribution by plaintiff.

Olsen v. States Line, 378 F.2d 217, 220 (9th Cir. 1967); Petitioner's Brief at 5-6.

The evidence produced at trial and the conclusions drawn by the jury indicate that it is most likely that Larkins committed suicide (A285-286). Suicide can hardly be considered an event which "does not happen in the absence of someone's negligence." Larkins' act of self-destruction was not a negligent act; it was an intentional act.

Secondly, *res ipsa* applies only if the instrumentality causing the injury was within the "exclusive control" of the defendant at the time of the accident. Because the specific instrumentality that caused Larkins' disappearance is unknown, it is impossible to determine whether that instrumentality was in respondent's exclusive control. Respondent was in control of the AUSTRAL PIONEER itself, but there is no evidence that the condition of the vessel's gear or appurtenances contributed to the disappearance. Moreover, the record is devoid of any evidence pointing to the ship as being the "instrumentality causing the injury."

To argue that the ship is the instrumentality causing Larkins' loss is to argue that the chair is the instrumentality causing the injury when a man ties a noose around his neck and jumps off a chair to complete the deed. The "exclusive control" requirement demonstrates why intentional acts do not properly fit within the *res ipsa* doctrine. There is no basis for application of the doctrine when the thing that caused the loss is under the exclusive control and management of the injured party. *Asprodites v. Standard Fruit & Steamship Co.*, 108 F.2d 728, 729 (5th Cir.), *cert. denied*, 310 U.S. 642 (1940); *Irwin v. United States*, 236 F.2d 774, 776 (2d Cir. 1956).

The third requirement, that the event was not due to any voluntary act or contribution on the part of the plaintiff, is clearly not satisfied. Nothing could have been more voluntary than for Walter Larkins to walk from his bedroom to the end of the passageway, through a dogged and watertight door, to the deck and over the solid guard rail that was more than 41 inches high (A356-357, 666). At the very least, Larkins contributed to the so-called accident:

> If the boiler of a locomotive explodes while the plaintiff engineer is operating it, the inference of his own negligence is at least as great as that of the defendant, and *res ipsa loquitur* will not apply until he has accounted for his own conduct.

Prosser, *Law of Torts* 224 (4th ed. 1971).

The Latin phrase, *res ipsa loquitur*, the thing speaks for itself, originated in *Byrne v. Boadle*, 2 H. & C. 722, 159 Eng. Rep. 299 (1863), in which a barrel of flour rolled out of a warehouse window and fell on an unsuspecting pedestrian. *Byrne* clearly satisfies the three criteria because a flour barrel does not ordinarily roll out of a warehouse window onto a passing pedestrian without someone's negligence; the barrel was within the defendant's exclusive control at the time of the accident; and the accident was certainly not due to any voluntary act or contribution on the part of the passing pedestrian. *See* Prosser at 213. *See also O'Connor v. Chandris Lines, Inc.*, 566 F. Supp. 1275 (D. Mass. 1983) (court applied *res ipsa loquitur* to draw the permissible inference that collapse of upper bunk on defendant's ship was caused by the negligence of defendant); M. Norris, *The Law of Maritime Personal Injuries* § 169, at 552-53

(3d ed. 1987 supp.) The unwitnessed disappearance of a man at sea does not merit the same inferences as a barrel falling on a passing pedestrian or a bunk falling on a ship's sleeping passenger.

III. THE APPLICABILITY OF *RES IPSA LOQUITUR* IS MOOT BECAUSE THE JURY NEVER REACHED THE ISSUE OF CAUSATION

The special verdict form submitted to the jury asked four specific questions about liaibility (SA106-107). It asked if the defendant was negligent and, if so, "Did the defendant's negligence cause or contribute even in the slightest to Walter Larkins' death?" The jury responded unanimously that the defendant was not negligent. Therefore, it never reached the question of causation with regard to negligence.

Similarly, the jury was asked if the ship was unseaworthy at the time of Larkins' death and, if so, did the unseaworthiness "cause or substantially contribute to Walter Larkins' death." The unanimous response was that the ship was seaworthy. Therefore, the issue of causation with regard to unseaworthiness was never reached.

Petitioner cites a variety of cases in her argument in favor of *res ipsa*. However, the cases cited rely upon clear factual findings of negligent or unseaworthy conditions such as slippery decks, or inadequate or non-existent handrailings, structural defects or overloaded cargo. *E.g.*, *Landry v. Two R. Drilling Co.*, 511 F.2d 138 (5th Cir. 1975); *Sweeney v. American Steamship Co.*, 491 F.2d 1085 (6th Cir. 1974); *In re Marine Sulphur Queen, 460 F.2d 89 (2d Cir.), cert. denied*, 409d U.S. 982 (1972). Here, the jury never even got to the issue of causation because it found that respondent's acts were not negligent and that the AUSTRAL PIONEER was seaworthy. Where unseaworthiness is alleged, the "unseaworthy condition must be a cause of injury for a right of action to result." *Fox v. The S.S. Moremacwind* (sic), 285 F.2d 222, 224 (4th Cir. 1960).

Res ipsa applies to a claim of unseaworthiness only when the claimant has established to the satisfaction of the trial court that the vessel was unseaworthy at the time it departed on its last voyage. As the Ninth Circuit stated:

> The sea itself contains many hazards, and an inference of liability of the shipowner for the mysterious loss of his vessel should not be lightly drawn. The court below obviously and properly believed that there could be no foundation for the inference absent satisfactory proof of an unseaworthy condition which might reasonably be expected to relate directly to the sinking of the vessel.

Walston v. Lambertsen, 349 F.2d 660, 662 (9th Cir. 1965), *cert. denied*, 382 U.S. 980 (1966).

Petitioner had to establish to the jury below by a preponderance of the evidence (1) that the respondent was negligent or that the ship was unseaworthy and (2) that the condition proximately caused the death of the seaman who went overboard. *Barrios v. Waterman Steamship Corp.*, 290 F.2d 310, 311 (5th Cir. 1961) (judgment for defendant shipowner affirmed because no proof that any negligence of defendant caused death of seaman. "[O]ne may only speculate as to whether he committed suicide, was the victim of foul play, or went over the side as a result of an accident, a sudden illness, or from some other cause."); *Nolan v. Greene*, 383 F.2d 814, 817 (6th Cir. 1967) (judgment for defendant vessel owner affirmed where no causal connection between drowning and defendant's failure to provide adequate number of fire extinguishers).

In *Rabb v. Canal Barge Co.*, 428 F.2d 201 (5th Cir. 1970), the court affirmed the jury's finding that the defendant was not negligent and the ship was seaworthy in a drowning case. A deckhand who had been on fog watch disappeared at sea and his body was found the next day. Plaintiff argued that defendant's failure to provide adequate lighting and guardrails around the tug made it unseaworthy as a matter of law and required application of *res ipsa* to the unwitnessed, unexplained drowing. The Fifth Circuit disagreed: "Resort to this doctrine, however, is not warranted in the absence of showing at least a malfunction, failure or misuse of the vessel, its appurtenances or gear, or some defect therein." *Id.* at 203. Petitioner herein did not show respondent to be negligent or the AUSTRAL PIONEER to be unseaworthy in any way. The jury's findings render the applicability of *res ipsa* moot.

IV. THE TRIAL JUDGE CORRECTLY INSTRUCTED THE JURY ON ISSUES RELEVANT TO *RES IPSA LOQUITUR*

The Larkins jury was properly charged that "under the [Jones] Act, if an employer's negligence played any part, even the slightest in producing the loss, the employer is considered negligent." (A610) The "even the slightest" language was repeated in the charge (at A611) and once again on the special verdict form itself which specifically asks the jury, "Did defendant's negligence cause or contribute even in the slightest to Walter Larkins' death?" (SA106-107)

The jury was also told that "the law makes no distinction between direct and circumstantial evidence" (A607). Circumstantial evidence was defined as "proof of a chain of circumstances pointing to the existence or non-existence of certain facts" (A607). *See* Prosser at 211-228 (discussing *res ipsa* as a type of circumstantial evidence). Further, the jury was instructed that if it were to find negligence by the shipowner it must then decide whether defendant's negligence "caused or contributed to the loss" (A614). The jury was told that its verdict must be for the plaintiff on the question of negligence if defendant "was a cause in whole or in part, directly or indirectly, however small, in the loss of Mr. Larkins' life" (A614). Despite these strong instructions, the jury's verdict was for defendant.

The instructions submitted by petitioner demonstrate why the trial court properly determined not to give them. For example, Petitioner's proposed jury instruction No. 20 (All) asks the Court to instruct the jury "that the injury to Plaintiff's decedent was proximately caused or contributed to by the treacherous deck." There was no evidence of a treacherous deck. The trial court properly denied petitioner's request to instruct the jury on *res ipsa loquitur* for the many reasons stated.

V. THE FOURTH CIRCUIT'S DECISION IN THIS CASE DOES NOT CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS

Petitioner alleges that the Fourth Circuit's decision in this case "directly conflict[s]" with decisions from other circuits. Petitioner's Brief at 7. Many of the cases cited by petitioner make no mention whatsoever of *res ipsa loquitur* and most of

the decisions emphasize the essential role of the jury in weighing conflicting evidence and arriving at findings or fact. Moreover, significant factual distinctions exist between the case at bar and the cases cited by petitioner. For example, in *In re Marine Sulphur Queen*, 460 F.2d 89 (2d Cir.), *cert. denied*, 409 U.S. 982 (1972), a case which makes no mention of *res ipsa loquitur*, a converted ship carrying molten sulfur was lost at sea. After hearing testimony about the overloading of the ship's cargo on its final voyage and additional testimony by experts as to the extensive structural changes undertaken in the conversion of the ship, the trial court held that the ship was unseaworthy in several respects. *Id.* at 97. The Second Circuit stated that once plaintiffs had sustained their burden as to unseaworthiness, they must then sustain their burden of proving that the unseaworthiness was in fact a cause of the injury. *Id.* at 99. The court found that plaintiffs, assisted by permissible inference as to causation, had proved their case. In the case now before this Court, the jury specifically found that the ship was seaworthy. Accordingly, there was no reason to proceed to questions of causation.

The facts of *Barboza v. Texaco Inc.*, 434 F.2d 121 (1st Cir. 1970), cited by petitioner, are markedly different from the facts now before the Court. In *Barboza*, a pantry man sued for injuries he sustained when he slipped on a zucchini squash while descending the stairway of defendant's vessel. There was little evidence as to how or when the squash got on the stairs. Plaintiff testified that he had cleaned his shoes on a mop ten minutes before descending and that he "couldn't possibly have" tracked the squash onto the stairs himself. *Id.* at 122. The jury found in favor of the plaintiff and the First Circuit affirmed. The factual setting of a man falling on a zucchini squash and injuring himself is vastly different from a man disappearing at sea whose body was never found and the instrumentality or cause of the injury remains undetermined.

Petitioner also cites *Ashland v. Ling-Temco-Vought, Inc.*, 711 F.2d 1431 (9th Cir. 1983), as a case in "direct conflict" with the Fourth Circuit's decision in the case now before the Court. Petitioner asserts:

> [In *Ashland*], the trial court's instruction to the jury that "you may infer that the death of plaintiff's decedent was

> caused by the negligence of the defendants" was affirmed even though the Court of Appeals acknowledged that "the precise cause of the accident remains a mystery," *Id.* at 1439.

Petitioner's Brief at 8. Petitioner is mistaken. In *Ashland*, a military airplane crashed at sea for unknown reasons. The case was tried to the court with an *advisory* jury under Rule 39(c) of the Federal Rules Civil Procedure. At the close of the evidence, the district court determined that the elements of *res ipsa* had been established as a matter of law. Accordingly, it instructed the advisory jury, "You may infer that the death of the plantiffs' decedents was caused by the negligence of the defendants." *Id.* at 1435. Applying that instruction, the advisory jury returned the verdict for plantiffs after which the court entered consistent findings of facts and conclusions of law. On appeal, defendants contended that the instruction given was erroneous. The Ninth Circuit stated, "We need not decide whether the instruction was error because of the advisory nature of the jury." *Id.* at 1437. Petitioner apparently interprets this statement as an affirmance of the instruction. The court remanded the case for further proceedings to determine the applicability of *res ipsa* to multiple defendants. *Id.* at 1435. *Ashland*, therefore, is not a case in "direct conflict" with the Fourth Circuit's ruling herein.

As discussed *supra* , Larkins' disappearance at sea does not satisfy any of the three required elements of *res ipsa loquitur*. However, even if *res ipsa* were applicable to this case, no harm was done in refusing to give the instructions requested by petitioner. Petitioner's arguments almost lead one to believe that the trial court had directed a verdict for the defendant. That is, of course, not true. The trial court submitted the case to the jury and instructed it on the value of circumstantial evidence and the light burden to be sustained by petitioner. The jury was free to draw whatever conclusions it wished from the evidence. *Res ipsa loquitur* is nothing more than a form of circumstantial evidence permitting the issue of liability to go to the jury and permitting the jury to draw inferences from the evidence presented. *See* Prosser at 211-228.

In most of the cases from other circuits cited by petitioner, the court deferred to the findings of the jury and affirmed the

judgment of the district court. *E.g., Sweeney v. American Steamship Co.*, 491 F.2d 1085 (6th Cir. 1974); *Barboza v. Texaco Inc.*, 434 F.2d 121 (1st Cir. 1970); *Admiral Towing Co. v. Woolen*, 290 F.2d 641, 649-50 (9th Cir. 1961) ("The trier of fact must be afforded substantial latitude in making this determination [as to how and why the accident occured] even though the evidence supporting it is slight and even though the reviewing court might have arrived at a different conclusion."); *Landry v. Two R. Drilling Co.*, 511 F.2d 138, 142 (5th Cir. 1975) (The jury is entitled to make "permissible inferences from unexplained events.")

VI. THE DECISION BELOW DOES NOT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

This Court has frequently upheld the right of the jury to weigh conflicting circumstantial evidence in arriving at a verdict. For example, in *Lavender v. Kurn*, 327 U.S. 645 (1946), a switch-tender employed by the railroad was found dead on the ground near the tracks. The autopsy concluded that the deceased was struck in the back of the head by "some fast moving small round object," causing a fractured skull from which he died. 327 U.S. at 648-49. Plaintiff's theory was that the deceased was struck by the mail hook on the outside of the train. Defendant's theory was that the deceased was murdered. There were no eyewitnesses to the death. The jury weighed the evidence and rendered a verdict for the plaintiff. The Missouri Supreme Court reversed, but the United States Supreme Court decided:

. . .

> We hold, however, that there was sufficient evidence of negligence on the part of [defendants] to justify submission of the case to the jury and to require appellate courts to abide by the verdict rendered by the jury.
>
> It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike [the deceased]. And there are facts from which it might reasonably be inferred that [the deceased] was murdered. But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck [the deceased]. The jury having made that inference, the respondents are not free to re-

> litigate the factual dispute in a reviewing court. Under these circumstances, it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury.

327 U.S. at. 652-53 (citations omitted). *See Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 504-07 (1957).

This Court's decision in *Johnson v. United States*, 333 U.S. 46 (1948), is consistent with the decision below in the instant case. In *Johnson*, the Supreme Court applied *res ipsa loquitur* in an admiralty case to permit the trier of fact to draw an inference of negligence from unexplained circumstances. The facts of the Johnson case are similar to the facts of *Byrne v. Boadle*, 2 H. & C. 722, 159 Eng. Rep. 299 (1863), discussed *supra*, the case in which a barrel of flour rolled out of a warehouse window onto a pedestrian. In *Johnson*, plantiff was hit on the head by a block dropped unaccountably from above by his co-worker. The Court found that "on the record either [the co-worker] or petitioner was the cause of the accident and it appears that petitioner was not responsible." 333 U.S. at 48. Accordingly, the Court found that a fair inference could be made that the man who dropped the block was negligent. *Id.* at 50.

In the case at bar, the jury found that respondent was not negligent and the AUSTRAL PIONEER was a seaworthy vessel. The jury reached this conclusion after weighing the circumstantial evidence presented. Petitioner should not be permitted to invade the function of the jury.

Cited as a case "which cuts through the mass of verbiage built up around the doctrine of *res ipsa loquitur*," this Court's decision in *Sweeney v. Erving*, 228 U.S. 233 (1913), upheld the jury's verdict for the defendant. *See Jesionowski v. Boston & Maine Railroad*, 329 U.S. 452, 457 (1947). Plaintiff had allegedly been burned by x-rays conducted by defendant and requested a jury instruction that the occurrence of the accident was itself evidence of negligence and cast upon the defendants the burden of proving, by a preponderance of the evidence, that the injury was not caused by his negligence. 228 U.S. at 238. The Court held that this instruction was properly refused because even in cases where *res ipsa* applies, it does not have the effect of shifting the burden of proof:

> The general rule in actions of negligence is that the mere proof of an "accident" (using the word in the loose and popular sense) does not raise any presumption of negligence; but in the application of this rule, it is recognized that there is a class of cases where the circumstances of the occurrence that has caused the injury are of a character to give ground for a reasonable inference that if due care had been employed by the party charged with care in the premises, the thing that happened amiss would not have happened. In such cases, it is said, *res ipsa loquitur*, — the thing speaks for itself; that is to say, if there is nothing to explain or rebut the inference that arises from the way in which the thing happened, it may fairly be found to have been occasioned by negligence.

228 U.S. at 238-39. (*Sweeney* was cited with approval in the admiralty context. *See Johnson v. United States*, 333 U.S. 46, 48 (1948).) The circumstances of Larkins' death do not give rise to an inference of liability by respondent. Further, even if such inference existed, it was soundly rebutted by the testimony of Dr. Niedermeyer that Larkins most likely committed suicide (A285-286).

Petitioner's argument that the "settled canon of maritime jurisprudence" requires the Court to give rather than withhold remedies to seamen even in doubtful cases (Petitioner's Brief at 12-14) suggests that petitioner should recover merely because the deceased was a seaman and the petitioner filed suit to recover for his death. As demonstrated herein, the jury plays a fundamental rule in the decision-making process of our judicial system. We must not invade its function of weighing conflicting circumstantial evidence and arriving at a just decision.

CONCLUSION

For the reasons stated, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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